

POINT PAPER

AMCCC-G

15 June 2000

SUBJECT: The Fair Labor Standards Act: Overtime Pay

Purpose: To provide information on potential litigation under the Fair Labor Standards Act (FLSA)

Facts:

1. **Pending FLSA Grievance**

- a. Filed by AFGE Local 62, representing approximately 30 employees of the Soldier System Team (SST), SBCCOM, Integrated Materiel Management Center (IMMC). The employees are physically located at a DLA installation in Philadelphia, PA.
- b. Grievance alleges that GS employees in various series, grades 9 through 12, should be nonexempt. They also seek back pay for overtime and travel time.
- c. The law firm representing the union, Mulholland & Hickey of Washington, D.C., has represented DLA employees located at the same installation as well as other employees nation-wide.
- d. DLA has already settled FLSA grievances for approximately \$5 million, but still has numerous grievances and court cases in process.
- e. Many DLA employees at the Philadelphia, PA site received settlements of approximately \$1400.00 per person.
- f. DLA personnelists service the SST employees, but elected not to handle this grievance in recognition of the fact that it may have AMC-wide and DA-wide implications.
- g. Negotiations are currently being conducted by an AMC, SBCCOM, and SSC team of personnelists and lawyers headed by Linda Mills, AMCCC-G.

2. **The Fair Labor Standards Act**

The FLSA of 1938, as amended, 29 USC 201-219, provides for minimum standards for both wages and overtime entitlement, and spells out administrative procedures by which covered worktime must be compensated. Non-exempt employees receive time and a half for overtime, as opposed to straight time for exempt employees. Non-exempt employees earn overtime if supervisors "suffer and permit" the work. Overtime for exempt employees must be ordered and approved. Non-exempt employees are often paid while travelling under circumstances which would not be considered duty hours for exempt employees.

3. Coverage

a. The FLSA began applying to employees of the United States Federal Government in 1974. Section 3(e)(2) of the Act authorizes the provisions of the Act to be applied to any person employed by the Government of the United States, as specified in that section.

b. Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act.

c. An **FLSA exempt employee** is one who is not covered by the minimum wage and overtime provisions of the Act.

d. An **FLSA nonexempt employee** is one who is covered by the minimum wage and overtime provisions of the Act.

4. Agency Authority

The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria in part 551 of title 5, Code of Federal Regulations (CFR), and supplemental guidance issued by OPM.

5. General Principles of Exemptions

a. Each employee is presumed to be FLSA non-exempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria in 5 CFR 551 and supplemental guidance issued by OPM.

b. Exemption criteria must be narrowly construed to apply only to employees who are clearly within the terms and spirit of the exemption.

c. The burden of proof rests with the agency.

d. An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

e. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (as opposed to duties described in a job description).

6. Statute of limitations

An FLSA pay claim is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (29 USC 255(a)), which imposes a **2-year statute of limitations**, except in cases of a willful violation where the statute of limitations is **3 years**. The term "willful violation" is broadly interpreted to include agency neglect. Liquidated damages can double the back pay award.

7. **Remedies**

There are four ways you may file an FLSA claim. You may file through a negotiated grievance procedure, an agency's administrative process, the U.S. Office of Personnel Management (OPM), or an appropriate United States court.

a. **Negotiated grievance procedure (NGP).** If at any time during the claim period, you were a member of a bargaining unit covered by a collective bargaining agreement that did not specifically exclude matters under the FLSA from the scope of the negotiated grievance procedure, you must use that negotiated grievance procedure as the exclusive administrative remedy for all claims under the Act. You have no right to further administrative review by the agency or by OPM.

b. - c. **Non-NGP administrative review by agency or OPM.** You may file a claim with the Federal agency employing you during the claim period or with OPM, but not both at the same time, if during the entire claim period you--

- (1) Were not a member of a bargaining unit, or
- (2) Were a member of a bargaining unit not covered by a collective bargaining agreement, or
- (3) Were a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the negotiated grievance procedure.

d. **Judicial review.** Nothing limits your right to bring an action in an appropriate United States court. Filing a claim with a Federal agency or with OPM does not stop the statute of limitations governing FLSA claims filed in court from running. OPM will not decide an FLSA claim that is in litigation.

8. **What's Being Done?**

a. Personnelists at DA level have formed a team which holds regular meetings to assess DA's position with respect to potential FLSA claims and to help recommend a plan of action. The team includes a legal representative from OTJAG, Labor & Employment Law Division, and from each MACOM.

b. At the team's request, CPOCMA (which manages DA's Civilian Personnel Operating Centers), is training a "swat team" to conduct a paper review of all positions at the GS 7 through GS 12 levels. This will help us identify and correct clear errors, while also preparing for future challenges.

c. Labor relations specialists at the local level are being asked to review the bargaining unit status of local employees. Correct coding of bargaining unit employees in advance of "group" grievances will save time.

9. What Should Be Done?

a. Labor counselors should inform their CPACs that they are interested in being informed of any FLSA cases, particularly at installations where grievances are customarily handled exclusively by personnel.

2. Labor counselors at the local level should immediately notify the Office of Command Counsel (Linda B.R. Mills) of any grievances challenging FLSA determinations.

c. Labor counselors throughout the command should attempt to familiarize themselves with existing law on FLSA determinations. The OPM web site has an enormous amount of information. Information was also provided at the AMC CLE.

d. Labor counselors should encourage and assist local bargaining to resolve FLSA disputes prior to arbitration and before involvement of lawyers who will seek liquidated damages (double back pay for 2 years or, if agency found negligent, double back pay for 3 years).

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